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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No

HUGO A. PINELL, JOHN L. SPAIN, LUIS N. TALAMANTEZ, WILLIE TATE, DAVID JOHNSON, and FLEETA DRUMGO,
Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the
State of California

The petitioners, Hugo A. Pinell, John L. Spain, Luis N. Talamantez, Willie Tate, David Johnson, and Fleeta Drumgo, pray that a writ of certiorari issue to review the decision of the Court of Appeal of California for the First Appellate District rendered in this cause on December 3, 1974.

OPINIONS BELOW

The decision of the Court of Appeal of California (Appendix A) is reported at 43 Cal.App.3d 627, 117 Cal.Rptr. 913. The decision of the Superior Court of Marin County (Appendix B) is unreported.

JURISDICTION

The decision of the Court of Appeal of California was entered on December 3, 1974. A timely petition for rehearing (Appendix D) was denied on January 2, 1975. A timely petition for hearing in the Supreme Court of California (Appendix C) was denied on January 29, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

The trial court below quashed the indictment against petitioners and held that the grand jury which indicted them was not selected from a fair cross-section of the community, in that, the selection process impermissibly discriminated against four identifiable groups in the community.

The California Court of Appeal reversed, holding that even though one such group was totally excluded as a class and others were systematically and substantially underrepresented, the grand jury selectors were not shown to have "purposefully" discriminated against such groups.

The questions thereby arising are:

1. Whether the findings of the trial court that petitioners had been indicted by a grand jury which was not in fact selected from a representative cross-section of the community, in violation of the Fourteenth Amendment, may be disregarded by the California Court of Appeal and the indictment against them reinstated on the basis of the latter court's conclusion that the grand jury selectors had no conscious purpose to discriminate.

2. Whether petitioners have established discrimination in the selection of the grand jury which indicted them where the grand jury selectors systematically and totally excluded "Latin Americans," a "distinct class" in the community, by making no affirmative effort to familiarize themselves with, or select, qualified potential grand jurors from this class.

3. Whether petitioners' Fourteenth Amendment rights were violated where the grand jury selectors disguised, through statistical overrepresentation, their failure to make any effort to familiarize themselves with the eligible black population of the county as a whole and instead selected only Blacks with whom they were personally acquainted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *United States Constitution,* Amendment XIV, Section 1:

> "... (N)or shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code Section 888.2 (in pertinent part):

"As used in this title as applied to a grand jury, 'required number' means . . . 19 in . . . counties [having a population not exceeding four million]."

California Penal Code Section 893:[1]

"A person is competent to act as a grand juror only if he possesses the qualifications prescribed by Section 198 of the Code of Civil Procedure.

A person is not competent to act as a grand juror if any of the following apply:

(a) The person is serving as a trial juror in any court of this state.

(b) The person has been discharged as a grand juror in any court of this state within a year.

(c) The person has been convicted of malfeasance in office or any felony or other high crime.

(d) The person is serving as an elected public officer."

California Code of Civil Procedure Section 198:[2]

"A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

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[1]Amended since the date of the indictment in the above-entitled case.

[2]Since amended.

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language."

California Penal Code Section 895:[3]

"During January in each year the superior court of each county shall make an order designating the estimated number of grand jurors that will, in the opinion of the court, be required for the transaction of the business of the court during the ensuing year."

California Penal Code Section 896 (in pertinent part):[4]

"Immediately after such order is made, the court shall select and list the grand jurors required by the order to serve as grand jurors in the superior court during the ensuing year, or until new lists of grand jurors are provided. The selections and listings shall be made of men and women suitable and competent to serve as jurors, pursuant to Sections 897, . . . and 899. The list of persons so selected shall at once be placed in the possession of the county clerk."

California Penal Code Section 897:[5]

"The selections and listings shall be made of persons suitable and competent to serve as jurors, and in making such selections there shall be taken only the names of persons who are not exempt from serving, who are in the possession of their

[3]Since amended.
[4]Since amended.
[5]Since repealed.

natural faculties, who are not infirm or decrepit, who are of fair character and approved integrity, and who are of sound judgment."

California Penal Code Section 899 (in pertinent part):

"The names for the grand jury list shall be selected from the different wards, judicial districts, or supervisorial districts of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making the lists. The grand jury list shall be kept separate and distinct from the trial jury list. . . ."

California Penal Code Section 900 (in pertinent part):[6]

". . . [The county clerk] shall . . . deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the 'grand jury box.' "

California Penal Code Section 901:

"The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned."

California Penal Code Section 902 (in pertinent part):[7]

"The names of persons drawn for grand jurors shall be drawn from the 'grand jury box.' . . ."

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[6]Since amended.

[7]Since amended.

California Penal Code Section 904:[8]

"Every superior court, whenever in its opinion the public interest so requires, shall make and file with the county clerk an order directing a grand jury to be drawn. Such order shall designate the number of grand jurors to be drawn, which shall not be . . . less than 25 nor more than 30 in . . . counties [having a population not exceeding four million]."

California Penal Code Section 905:

"In all counties there shall be at least one grand jury drawn and impaneled in each year."

STATEMENT OF THE CASE

Petitioners are four Black and two Latin American men, all of whom were, at the time of the indictment challenged herein, inmates at California State Prison, San Quentin. Five of them still remain in custody at that institution.

Petitioners were indicted by the 1971 Marin County (California) grand jury on October 1, 1971 and charged variously with conspiracy, murder and assault.

On September 14, 1973, petitioners moved to set aside the indictment on the ground, *inter alia,* that the grand jury selection process systematically excluded or substantially underrepresented determinable segments of the county population.

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[8]Since amended.

In support of this motion, an extended evidentiary hearing was conducted, encompassing sixteen court days and nearly two thousand pages of reported testimony (see generally, R.T.* 833-2771).

There was no significant conflict in the evidence concerning the manner in which the 1971 grand jury was selected. That grand jury was the first to be empaneled after the Marin County Superior Court judges instituted a change in their system for choosing the thirty selectees for the body.[9] Before 1971, the five judges themselves had made virtually all nominations to the grand jury (R.T. 1385). Several judges noted that there was justified criticism of the resulting body as being unrepresentative, with the grand juries being dominated by "the 'courthouse gang,' the Fourth Street, San Rafael, gang, 'or establishment,' whatever you want to use. . . ." (R.T. 1134-35; 1027-28; 1122; 1202).

In 1971, the judge-selectors attempted to broaden the sources of grand jury nominees. The presiding judge wrote to 79 organizations from a list submitted by the Marin Council for Civic Affairs (MCCA), asking each organization to recommend potential grand jurors (R.T. 1124; 926).

An expert witness, a sociologist, testified that studies of organizations show that the higher one ascends the socio-economic scale, the greater the tendency to join organizations (R.T. 1652). He concluded that only a special effort to find working class organizations (an

*Reporter's Transcript.

[9]*See* CAL. PEN. CODE § 904, *supra*.

effort not undertaken by the judges) would be able to produce a cross-section of the population from organizational sources (R.T. 1653). His examination of the MCAA list indeed showed that all but two of the 79 groups were probably composed mainly of middle class, or upper middle class, people (R.T. 1651-56). Homeowner and business organizations predominated (R.T. 1654-55). There were no ethnic organizations on the list (Exhibit 26).

These organizational sources submitted approximately 75 names, which were supplemented by approximately thirty more, consisting of the judges' own nominees, people recommended by the judges' acquaintances, and two or three volunteers (R.T. 947; 1365-66; Exs. 1; 20; 22).

Questionnaires were sent to each of the resulting 105, and the responses were used in the further selection process (R.T. 973-74). On a consensus basis, the judges reduced the 105 names to the thirty placed in the jury wheel for the random drawing of nineteen (R.T. 956; 1159-63).[10] Some of the judges may have tried to find more Blacks and working people before the process reached this stage, but they testified there were problems getting people willing to serve because they could not afford the time (R.T. 954-55; 1062-64).

Since the judges conceded that their system of handpicking grand juries had not selected jurors from a cross-section in the past, statistics on the nominees and potential nominees were limited to 1971, the year the judges implemented the new system of soliciting names

[10]Pursuant to CAL. PEN. CODE §§ 888.2, 902, see *supra*.

of potential nominees from the recommended organizations.

The evidence showed that the thirty nominees consistently reflected the composition of the Marin County bench more than that of the general population: income, education, occupational status, age, and length of residence were significantly higher than that of the population generally (Ex. 22). There were no Latin Americans, the judges being unaware of the existence of Marin County's Latin American community (R.T. 1047-48; 1167-68; 1249; 1367). The only working class person on the final thirty, a bus driver, was included on the panel when a questionnaire was mistakenly sent to him instead of to its intended recipient, a former Novato mayor of the same name (R.T. 1595). The judges nominated two Blacks of their acquaintance (1275-76; 1379; 1425-26), but, as one judge testified, these upper middle-class people had nothing in common with the depressed community which contained 90% of the county's Blacks (Ex. E; Exs. 33, 34; R.T. 1426). Indeed, the selectors made no effort to choose jurors from this community (R.T. 1426).

Specifically, in addition to the total exclusion of Latin Americans, the evidence showed the following data concerning the substantial underrepresentation of two other groups found by the trial court to be identifiable in Marin County: the blue collar working class[11] and young people under thirty.

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[11]Both the defense and prosecution sociologists testified that blue collar workers can generally be defined as those who work as craftsmen, foremen, skilled workers, operatives, semi-skilled workers, laborers, service workers, and farm workers; and that white collar

Eleven of the 105 original nominees and one[12] of the thirty final nominees were known to be blue collar workers. (The occupation of one of the original 105 was unknown.) Three of the original nominees and one of the final nominees were under the age of thirty (Exs. 22; 23; 24).

Dr. Peter W. Sperlich, an expert in the use of statistical probability theory, testifying for the defense, analyzed these figures to determine whether these results could occur in an unbiased selection process. Assuming that the unknown occupation was blue collar, he calculated that the likelihood of blue collar occupations being as underrepresented as they were, in an unbiased system, would be:

(a) three chances in ten quadrillion for the 105 original nominees; and

(b) five chances in one hundred million for the thirty final nominees. (Ex. 30; R.T. 1777).

Dr. Sperlich concluded that the low probabilities were statistically significant and demonstrated that there was bias in the selection process (R.T. 1777; 1781). The defense requested the prosecution statistician to recalculate these incredibly low probabilities, but he was unable to find the time to do so (R.T. 2198; 2489).

Dr. Sperlich similarly calculated the probabilities regarding the selection of young people, with the following results:

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workers generally are those persons in professional, technical, managerial, administrative, sales and clerical occupations (R.T. 1667-68; 2070).

[12]The aforementioned bus driver, see *supra*.

(a) an unbiased system would draw a panel with the composition of the 105 original nominees one time in ten million;

(b) for the thirty final nominees, the figure was six in one thousand. (Ex. 30; R.T. 1775).

He again found these figures to be statistically significant (R.T. 1776). The prosecution statistician, ignoring the astronomical figures with respect to the 105 nominees, recomputed the above probabilities only for the thirty finalists. Nevertheless, he, too, found statistical significance and, therefore, bias in the selection process (R.T. 2488-89).

On January 17, 1974, the trial court judge who examined the operation of this selection system concluded from all the evidence presented that

> "the means used by the selectors did not assure a fair representation of the group [sic] to which the moving Defendants belong, to wit: The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the grand jury was selected. The pool was not shown to represent a cross-section of the community." (App. B; p. xv).

Consequently, the court ordered the indictment against petitioners quashed (App. B, p. xv).

The People of the State of California appealed, and in a decision filed on December 3, 1974, the California Court of Appeal reversed the trial court's ruling and ordered the indictment against petitioners reinstated (App. A, p. x). The Court of Appeal agreed that there was evidence to support the trial court's finding

of the existence in Marin County of the four "distinct" groups cited by the trial court (App. A, pp. ii-iii). However, the Court of Appeal held that the grand jury selection system was valid because there was no purposeful discrimination by the judge-selectors who acted in good faith. Erroneously concluding that the trial court "looked only to the result, rather than the manner, of the selection," (App. A, p. x) the Court of Appeal avoided the trial court's (and petitioners') contention that the grand jury was not selected from a representative cross-section of the community.

On January 29, 1975, the California Supreme Court denied petitioners' petition for a hearing by that court, thereby causing the remittitur to be issued by the Court of Appeal and revesting jurisdiction of the above-entitled action in the Marin County Superior Court (App. C).

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The federal questions were first presented during pre-trial proceedings in the trial court below, by motion to challenge the process of selecting the grand jury which indicted petitioners. Petitioners contended that the grand jury was illegally composed, in violation of the due process and equal protection clauses of the Fourteenth Amendment, because the grand jury was not selected from a representative cross-section of the community, in that determinable segments of the community were systematically excluded or substantially underrepresented and the selectors made no affirmative effort to familiarize themselves with the

qualifications of those eligible for jury service. A hearing on this motion was held, at the conclusion of which the trial court granted petitioners' motion, agreeing that the selection process did not assure a grand jury which represented a fair cross-section of the community (App. B, p. xv).

On respondents' appeal to the California Court of Appeal, petitioners again asserted the equal protection and due process claims in urging that the trial court's order be affirmed. The Court of Appeal rejected these contentions and reversed the trial court's order quashing the indictment, ruling that "the constitutional standard has not been violated." (App. A, p. x). A petition for rehearing was denied (App. D).

Thereafter, petitioners again raised the Fourteenth Amendment due process and equal protection arguments in a petition for hearing in the Supreme Court of California. However, the Supreme Court of California denied the petition for hearing (App. C).

REASONS FOR GRANTING THE WRIT

> "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana,* 95 S.Ct. 692, 698 (1975).

This case raises a claim of unconstitutional discrimination against racial and other legally identifiable groups in grand jury selection which merits granting

certiorari. The case was incorrectly decided below, as the California Court of Appeal improperly interpreted and applied relevant decisions of this Court and those of other federal courts. Moreover, the case involves issues of transcendent importance to the goal of achieving nondiscriminatory grand jury selection. In particular, the peculiar factual situation and procedural background of this case afford this Court an appropriate vehicle by which to render applicable to the states, under the Fourteenth Amendment, the requirement that a grand jury be selected from a representative cross-section of the community, as well as to more precisely define the scope of the "affirmative duty test"[13] imposed upon grand jury selectors. The decision of this Court would be based upon a fully-formed record, consisting of numerous exhibits, comprehensive statistical data and analysis, and over 1900 pages of testimony. Finally, an eventual ruling favorable to the six petitioners herein would eliminate the necessity for them to face serious criminal charges and an extremely protracted and expensive trial under an unconstitutionally obtained indictment.

In quashing the indictment against petitioners, the trial court below found four groups or classes of people to be legally "distinct":[14] "the Blacks, the Latin

[13] *See, e.g., Cassell v. Texas*, 339 U.S. 282, 289 (1950).

[14] The cases interchangeably employ such terms as "distinct" (*Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *United States v. Butera*, 420 F.2d 564, 569 (1st Cir. 1970)), "identifiable" (*Peters v. Kiff*, 407 U.S. 493, 503 (1972); *Brooks v. Beto*, 366 F.2d 1, 22

Americans, the blue collar working class and the young."[15] The Court of Appeal agreed that there "is evidence to support the trial court's finding of four such classes in Marin."[16] However, the Court of Appeal reversed the trial court and applied an improper constitutional standard, holding that there was no evidence of "intentional" discrimination by the grand jury selectors against any of these four groups. The Court of Appeal mistakenly credited the grand jury selectors' disclaimer of discrimination and stated "the record discloses a fair and honest effort to secure a panel representing a true cross section of the county population."[17]

The Court of Appeal conclusion is erroneous, for "(t)he jury commissioners must be held to have intended the natural result which flowed from their conduct." *Rabinowitz v. United States,* 366 F.2d 34, 56 (5th Cir. 1966). Specifically, the selectors must choose a grand jury from a fair cross-section of the community. *Carter v. Jury Commissioners,* 396 U.S. 320, 332-33 (1970); *Brown v. Allen,* 344 U.S. 443, 474 (1953); *Labat v. Bennett,* 365 F.2d 698, 722-24 (5th Cir. 1966). In so doing, they have a "duty to familiarize themselves fairly with the qualifications of the

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(5th Cir. 1966)), "cognizable" (*United States v. Butera, supra,* at 569), "substantial" (*Peters v. Kiff, supra,* at 503; *United States v. Burkett,* 342 F.Supp. 1264 (D.Mass. 1972)), and "significant" (*Brooks v. Beto, supra*) when referring to groups or classes which cannot legally be discriminated against in the selection of a grand jury. This petition does likewise, since all such descriptions seem to have an identical meaning when used in this context.

[15]App. B, p. xv.

[16]App. A, pp. ii-iii.

[17]App. A, p. x.

eligible jurors of the county. . . ." *Cassell v. Texas,* 339 U.S. 282, 289; *accord, Hill v. Texas,* 316 U.S. 400, 404 (1942); *Smith v. Texas,* 311 U.S. 128, 132 (1940); *Brooks v. Beto,* 366 F.2d 1, 12-14, 23 (5th Cir. 1966). However, in the instant case the evidence is uncontradicted that the five grand jury selectors, the five judges of the Marin County Superior Court, failed to discharge this duty. They made no affirmative effort to include Latin Americans,[18] but instead chose grand jurors from their personal acquaintances and from organizations which in no way reflect a cross-section of Marin County's population. Their assertions that they did not intend to discriminate or that they acted in good faith are clearly inadequate.[19] The simple fact is, as the trial court put it, that Latin Americans were "overlooked . . . by the judges.[20]

The decision below conflicts with principles of federal constitutional law in the area of jury discrimination. The California Court of Appeal refused to follow *Cassell,* which, on the facts of this case, compelled the court below to reach the legal conclusion that the

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[18]R.T. 1010; 1167; 1172; 1351. For example, Judge Gardiner testified that he did not "recall having taken any affirmative steps" to include Latin Americans on the 1971 grand jury (R.T. 1010-11). Judge McGuire said that he, too, did not take any affirmative steps to include them and added that he was "not aware of any such identifiable group other than people who I know personally in that category" (R.T. 1167). Judge Wilson testified:

"Q. . . . To your knowledge was any effort made to include people with Spanish surnames on the grand jury in 1971?

A. Not as such, not that I can recall." (R.T. 1351).

[19]*See, e.g., Alexander v. Louisiana,* 405 U.S. 625, 632 (1972); *Turner v. Fouche,* 396 U.S. 346, 361 (1970); *Avery v. Georgia,* 345 U.S. 559, 561 (1953); *Hernandez v. Texas, supra,* 347 U.S. at 481-82; *Norris v. Alabama,* 294 U.S. 587, 594-95, 598 (1935).

[20]R.T. 2603.

failure of the grand jury selectors to fairly familiarize themselves with the eligible Latin Americans resulted in discrimination. The Court of Appeal avoided reaching the legally required conclusion by the creation of a novel exception to the Fourteenth Amendment. The court below agreed and found that Latin Americans constituted an identifiable group but held that it could be overlooked because it was not "identifiable" enough. At best, this is specious reasoning and is internally inconsistent. A group either is or is not legally identifiable in a particular community.

The novel exception which the court below has engrafted on the Fourteenth Amendment unless corrected by this Court will undermine decades of efforts to eradicate discrimination in grand jury selection and service. The opinion below revives the "two-class theory" which this Court rejected over twenty years ago in *Hernandez v. Texas,* 347 U.S. 475, 478 (1954). There, this Court stated, "(t)he Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." Once a group is determined to be an "identifiable one, the selectors cannot ignore it and thereby withhold Fourteenth Amendment protections. In terms of size, militancy, and group characteristics, Latin Americans do not have to be fungible with Blacks in order to enjoy Fourteenth Amendment rights. As this Court stated in *Hernandez,* ". . . community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." 347 U.S., at 478.

If the decision of the Court of Appeal is allowed to stand, discrimination itself will become a justification for exclusion. Latin Americans constitute the largest minority in the State of California and in Marin County. They are estimated to comprise 6% of Marin's population of approximately 207,000 persons.[21] There are nearly three times as many Latin Americans in Marin County than there are Blacks, who constitute approximately 2% of the county's total population.[22] Yet the Court of Appeal would allow them to be excluded on the basis of the erroneous determination that they are "at most a very small proportion of the population."[23]

The Court of Appeal would tolerate the denial of equal protection by distorting evidence relative to the discriminatory effect of ethnic isolation in Marin County. The court below asserted that Latin Americans are "not readily recognized."[24] This was clear distortion of testimony along this line:

> "Q. Do you think that there is a Mexican-American Spanish speaking, Spanish heritage community in Marin County?
>
> A. Oh, very definitely. It just isn't very recognized, that's all.
>
> I mean, it is recognized by our own people, but not by, say, the majority of Marin County which is Anglo-Saxon white."[25]

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[21] 1970 Census (California), *General Social and Economic Characteristics*, p. 6-1034.

[22] 1970 Census (California), *General Population Characteristics*, p. 6-310.

[23] App. A, p. vii.

[24] App. A, p. viii

[25] R.T. 1981. The grand jury selectors were Anglo-Saxon white, lived in all-white communities, and belonged to all-white profes-

The decision below has the potential to effectively repeal the Fourteenth Amendment. Application of its rationale throughout California and in other states would permit the withholding of Fourteenth Amendment protections solely because the group or class against which discrimination was directed might be deemed "small and not readily recognized by the community generally."[26] Litigants in such jurisdictions would have to shoulder an additional burden of proving that the failure to fairly familiarize was not "self-induced" by "an intentional closing of the eyes to facts widely known,"[27] whereas litigants in other jurisdictions presumably would not need to prove that such discrimination was self-induced. The right to due process and equal protection of law cannot be made to depend upon such territorial happenstance. *Compare O'Brien v. Skinner,* 414 U.S. 524 (1974).

Moreover, the law is clear that, whether done intentionally or in good faith, the failure of the selectors to acquaint themselves with eligible constituents of the Latin American community constitutes a failure to meet their constitutional duty to select a grand jury from a representative cross-section of the community. "The result bespeaks discrimination, whether

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sional, civic, social and religious organizations (R.T. 920-21; 1069; 1113-15; 1254-55; 1337-38). Any selection system in which the judges of the local superior court act as key-men is likely to produce an unconstitutional outcome. Such selectors are "by reason of birth, education, residence, wealth, social and professional associations and similar factors not acquainted with the qualifications of the eligible grand jurors" who do not belong to their own race and class. *Montez v. Superior Court,* 10 Cal.App.3d 343, 350 (1970).

[26]App. A, p. viii

[27]*Id.*

or not it was a conscious decision on the part of any individual jury commissioner." *Hernandez v. Texas, supra,* 347 U.S., at 482.

Young people and blue collar workers were substantially underrepresented. It was found by the trial court that they were cognizable groups in Marin County. Statisticians for both sides showed a significant statistical bias against these groups on the Marin County grand jury. In other words, the probability that such an underrepresentation could have obtained by the operation of chance alone was at best remote and at worst astronomically low.[28] Such statistical evidence strongly suggests a discriminatory selection process,[29] and the state failed adequately to explain such discrimination. Latin Americans, of course, were simply forgotten (see *supra*). The proffered justification for the gross underrepresentation of blue collar workers and youth, while perhaps not so totally devoid of reason, is nevertheless wholly insufficient constitutionally.

Two selectors asserted that it was difficult to nominate persons from these two identifiable groups (as well as from among Blacks, see *infra*) because economic and educational pressures would prevent such people from devoting the time necessary to properly discharge their duties, especially administrative, as

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[28] *See generally* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV.L.REV. 338 (1966), *cited in Whitus v. Georgia,* 385 U.S. 545, 552 (1967).

[29] *Whitus v. Georgia, supra,* 385 U.S. at 552.

grand jurors.[30] One of these selectors, however, apparently arrived at this sweeping judgment by pure speculation,[31] and the other did so on the basis of talking to no more than a relative handful of the members of these groups.[32] The result was to virtually exclude both blue-collar workers and youth as a *class.*

It would seem clear that the state must offer a more persuasive reason for denying a constitutionally-protected right: petitioners' right to deliberation by a grand jury which contains a representative cross-section of the community. This Court has recently held that "(t)he right to a proper jury cannot be overcome on merely rational grounds." *Taylor v. Louisiana, supra,* 95 S.Ct., at 699-700. Although the *Taylor* case admittedly involved a challenge to a petit jury venire, this Court has stated that the principles applicable to the systematic exclusion of potential jurors "are essentially the same for grand juries and for petit juries. . . ." *Alexander v. Louisiana,* 405 U.S. 625, 626 n. 3 (1972); *accord, Pierre v. Louisiana,* 306 U.S. 354, 358 (1939).

The testimony of the selectors in the instant case offers an excuse for the exclusion of cognizable groups which clearly does not arise above the "merely rational grounds" proscription of the *Taylor* case.[33] This Court

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[30]It should be noted that, in apparent contradiction to this testimony, one selector stated that there was no affirmative or "conscious" effort to include blue-collar workers or young people on the grand jury (R.T. 1347-48).

[31]R.T. 1062-64.

[32]R.T. 954-55.

[33]It is arguable that not even "rational" grounds were offered for such exclusion. In *Labat v. Bennett, supra,* the jury selectors

in *Taylor* specifically emphasized that although the states are free to exempt from jury service *individuals* who would be subject to hardship if made to so serve, the states cannot on that basis blanketly exempt entire groups and thereby render the remaining jury pool unrepresentative of the community. 95 S.Ct., at 700. Just as this Court in *Taylor* rejected the contention that it would be a hardship for "each and every woman to perform jury service,"[34] so also is it untenable to suggest that all, or virtually all, blue collar workers and young people would be subjected to hardship if required to serve on the Marin County grand jury.

Moreover, the state had available to itself alternatives which are less restrictive of the due process and equal protection rights of criminal defendants: for example, the establishment of two separate grand juries, one to consider criminal indictments and the other (consisting of persons who have more time to devote to grand jury service) to carry out the "watchdog" function of overseeing the administration of county government.[35] But, no such alternative was

excluded daily wage earners as a class on the ground of "financial hardship." The court found that this violated the Equal Protection Clause of the Constitution because the economic standing of such people had no reasonable relationship to their competency as jurors. 365 F.2d, at 723. *Cf. Thiel v. So. Pacific Co.*, 328 U.S. 217 (1946).

[34]95 S.Ct., at 700.

[35]Because of just such considerations, this procedure was recently adopted, effective March 1, 1975, in Marin's neighboring county of San Francisco. *See* San Francisco *Chronicle*, January 28, 1975, at 5, col. 6. Similarly, California State Assemblyman Edwin L. Z'berg has introduced into the California legislature a bill which would require California counties of over 700,000 population to impanel two separate grand juries—an "indictment

employed; instead, it was considered easier to choose a grand jury from sources not reflective of the community of Marin County.

The other identifiable group cited by the trial court in quashing the grand jury indictment herein is "Blacks." This group is technically overrepresented on the grand jury as compared to its percentage of the population in the community as a whole. However, a close look at the evidence reveals unconstitutional discrimination in the selection of this racial group as well. The testimony of the selectors reveals that the two Blacks chosen for the 1971 grand jury both were personally acquainted with several of the selectors, coming as they did from the same social or political circles as the selectors.[36] There was no attempt by the selectors to familiarize themselves with the qualifications of the eligible Blacks in Marin County as a whole and not just of their personal acquaintances. *Cf. Cassell v. Texas, supra; Smith v. Texas, supra.* The irresistible conclusion to be drawn from this practice is that the selectors, aware of the long line

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panel" and a "civil panel". In apparent recognition of the fact that grand jury panels have heretofore often been unrepresentative of the communities from which they were chosen, any county's indictment panel would have to be selected by "random selection" in the same manner as the trial jury venire of that county. However, under the provisions of this proposed legislation, the presiding Superior Court judge in counties under 700,000 population (which would include Marin County) would retain the discretion to impanel either two separate grand juries or a single grand jury combining both indictment and civil functions. California A.B. 352, 1975-76 Reg. Sess. (December 26, 1974).

[36]R.T. 1275-76; 1379. Both Blacks could only be described as middle-class, occupationally and economically. Their respective incomes were nearly three times that of the average Black person in Marin County (Ex. 34; Ex. E).

of Supreme Court cases proscribing discrimination against Blacks in grand jury selection,[37] decided they had to include some black faces on the grand jury list.

Such token inclusion[38] fails to satisfy the cross-section requirement.

One final point must be discussed. Petitioners' grand jury challenge was based solely upon the selection process for one year—1971. The Court of Appeal made much of this fact, noting that petitioners failed to show "a substantial history of gross inadequacy of representation"[39] of the cognizable groups herein involved. As a result, the Court concluded, unconstitutional discrimination was not, and could not be shown to exist, because "[p]roportional representation is not required" on a single grand jury.[40]

Such reasoning is hardly persuasive in the instant case. It is certainly true, as the Court says, that proportional representation on a single grand jury of every determinable group is not required,[41] and petitioners have never claimed otherwise. But this Court has emphasized that a showing of discrimination in the grand jury selection process

> "does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. Since the issue

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[37] *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880).

[38] *Cf. Cassell v. Texas, supra*, 339 U.S., at 287.

[39] App. A, p. iv.

[40] App. A, p. v.

[41] *Cassell v. Texas, supra*, 339 U.S., at 286; *Akins v. Texas*, 325 U.S. 398, 403 (1945).

must be whether there has been discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case." *Cassell v. Texas, supra,* 339 U.S. at 290.

Cf. Alexander v. Louisiana, supra (wherein a finding of unconstitutional discrimination was based upon the selection of one grand jury only). In the instant case, the selectors, as established by their own testimony, completely ignored Latin Americans as a source of grand jurors. The exclusion of blue collar workers and young people was almost as blatant (see *supra).*

Moreover, as the Court of Appeal observed, "this grand jury is the first chosen in Marin County under the present method."[42] This fact not only adequately explains the failure of petitioners to introduce comprehensive statistical evidence of prior grand jury composition, but is in itself arguably tantamount to proof that the former selection procedure was constitutionally defective. Indeed, the selectors testified that they had changed the selection procedure because of the many complaints they had received and because of their own belief that the former system was not producing representative grand juries.[43]

In any event, it is preposterous to conclude that the institution of a new grand jury selection procedure precludes a finding of discrimination in the selection

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[42]App. A, p. iv.

[43]Latin Americans, for example, apparently had been totally ignored by the selectors, and thus systematically excluded, for many years prior to 1971 (R.T. 1907-08; 1917).

process. Such a holding would enable a county to perpetually insulate itself from such attack simply by revising its grand jury selection procedure with the choosing of each new grand jury.

This Court recently emphasized the potential for abuse in the process of selecting petit juries, when it observed that

> "[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation omitted.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Taylor v. Louisiana, supra,* 95 S.Ct., at 698.

This language, however, probably applies even more forcefully to the composition of *grand* juries. Unlike trial by a petit jury, a grand jury proceeding affords a potential defendant virtually no procedural protections. The right to counsel, to confrontation and cross-examination of witnesses, and even simply to be present, are all absent. For this reason, the courts should be especially vigilant in assuring that a strict standard for the selection of grand juries be observed. The granting of this petition, and an ultimate judgment in favor of petitioners, would be a significant

step toward making the attainment of that goal a reality.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated, March 11, 1975.

Respectfully submitted,

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(Appendices Follow)

Appendix A

(CERTIFIED FOR PUBLICATION)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 CRIMINAL No. 12848
(SUP. CT. No. 4094)

People of the State of California,
Plaintiff and Appellant,
vs.
Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Dec. 3, 1974]

OPINION

All defendants were indicted for murder. (Pen. Code, § 187), conspiracy (Pen. Code, § 182), and assault with a deadly weapon by a prisoner either under life sentence (Pen. Code, § 4500) or a sentence for less than life (Pen. Code, § 4501). All moved to quash the indictment (Pen. Code, § 995) on the ground that the grand jury which returned the indictment in 1971 was improperly chosen.

Respondents contend that "significantly identifiable elements" of the population of Marin County had been excluded from the pool of 30 names from which the 19 grand jurors for 1971 were drawn. An extended evidentiary hearing was held. Among the witnesses were the judges of the superior court. They solicited names of prospective jurors from a total of 79 civic, labor, ethnic and other organizations of the county, receiving 75 names from that solicitation. They added 30 names they had personally gathered. The judges testified that they collectively sought to obtain a fair cross section of the community, including old and young, male and female, black and white, rich and poor, and those with a knowledge of each section of the county, and that no group was intentionally excluded. Questionnaires were sent to each of the 105 thus chosen. From the replies, the judges unanimously selected 30 names for the grand jury panel. These names were placed in the jury wheel, and the 19 to serve on the 1971 grand jury were chosen by the usual random method.

From the mass of evidence before it, the trial court concluded that "the means used by the selectors did not assure a fair representation of the group to which the moving Defendants belong, to wit: The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the Grand Jury was selected. The pool was not shown to represent a cross-section of the community."

Whether a group constitutes a "distinct class" in a particular community is a question of fact. (*Hernandez v. Texas*, 347 U. S. 475, 478.) There is evi-

dence to support the trial court's finding of four such classes in Marin.

But it must be "further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification," to establish that the constitutional guaranties have been violated (id.).

The mechanics of the selection process here used are well within the scope of the statute (Pen. Code, § 903.4) governing the choice of grand jurors in California. Constitutionality of this statute has been repeatedly upheld by our courts (In re Wells, 20 Cal. App. 3d 640, 649; People v. Newton, 8 Cal. App. 3d 359, 388; People v. Cohen, 12 Cal. App. 3d 298, 309). The United States Supreme Court has upheld a comparable statute (Carter v. Jury Commission, 396 U.S. 320, 331-6). Thus the law "as written" meets constitutional standards.

The core issue is whether the selection process "as applied" in this case singles out for different treatment any of the classes to which defendants belong.

The long-established rule is that equal protection is denied only by a method of selection which "intentionally and systematically" excludes or underrepresents a cognizable class (Whitus v. Georgia, 385 U. S. 545, 548-52; Hernandez v. Texas, 347 U. S. 475, 476-8; In re Wells, 20 Cal. App. 3d 640, 649; People v. Nero, 19 Cal. App. 3d 904, 910). The rule applies to grand as well as petit juries.[1] Direct proof that

[1]Deep concern for meticulous care in the selection of trial juries is readily understandable. Under Federal as well as California procedures, the trial jury has broad fact-finding powers which go

elimination or undue reduction of members of a class is intentional or purposeful is frequently impossible. But the element of purpose may be deduced from a substantial history of gross inadequacy of representation of a class (e.g. Smith v. Texas, 311 U.S. 128, 131). When a defendant shows a history, he has made a prima facie case of discrimination, and the burden shifts to the prosecution to explain and justify the discrepancy. Since this grand jury is the first chosen in Marin County under the present method, there is no such history.

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to the essence of fairness and equal protection. We recognize that the Federal rule as to grand juries has been extended indiscriminately to all 50 states, regardless of their practice and procedure, and that the courts of California have, with little or no comment, accepted and applied this rule to indictments in California. But the grand jury is solely an accusatory body. Under the Federal procedure, the evidence upon which it acted is zealously withheld from the defendant, who is forced to go to trial and can raise no issue of insufficiency of the evidence until the prosecution, at trial, rests its case (see Draper, State Experience Points Way for Improvement of Federal Criminal Procedure (1967) 42 State Bar J. 34). California, since 1927, has required delivery to each indicted defendant of a copy of the transcript of testimony before the grand jury. (Pen. Code, §938.1, derived from Stats. 1927, ch. 684, p. 1156, §2 [then Pen. Code, §925].) The defendant, fully informed by the transcript of the accusatory evidence against him, is given the right to have the indictment set aside upon a judicial determination that such evidence does not constitute reasonable or probable cause to charge him, (Pen. Code §995) and to have that determination reviewed by an appellate court (Pen. Code §999a). Thus as indicted defendant, before undergoing the burden of trial, can have a full determination of the adequacy of the evidence to warrant a charge against him. At least arguably, this places a lesser burden upon him than the alternative procedure—complaint by a law officer, preliminary examination before a magistrate, and information filed by a district attorney. In this opinion, we assume applicability of the Federal rule to a California indictment. We but note the distinctions in procedure in the somewhat faint hope that they may at least lead to consideration of some amelioration of the Federal practice as to grand jury testimony and the setting aside of indictments.

"Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals * * * . Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried * * * . The mere fact of inequality in the number selected does not in itself show discrimination." (Akins v. Texas, 325 U.S. 398, 403.) Proportional representation is not required, and the proportional limitation necessary to achieve it is forbidden. (Cassell v. Texas, 339 U.S. 282, 287.)

Here there is no evidence of intentional discrimination by the selectors against any of the four groups which the trial court found to exist. Their testimony to the contrary is not disputed. Respondents, however, argue that they met their burden by showing that the selectors had an opportunity to discriminate and that four cognizable groups are statistically underrepresented. The authority they cite (Alexander v. Louisiana, 405 U. S. 625, 631) does not support this argument. The one decision most nearly approaching respondents' view (United States v. Butera (1 Cir. 1970) 420 F. 2d 564, 569) notes (fn. 7, p. 568) that it does not create a constitutional standard for the states, but rests upon the supervisory power of the federal appellate courts over the federal trial courts. Morover, *Butera* holds only that such a situation places upon the government the burden of demonstrating that the disparities are not the product of discrimination. Thus, even if the rule be fully applied

to the facts before us, it does not result in holding this selection process invalid. We look at each of the four groups involved.

Blacks constitute 6.7 percent of the panel of 30, but only 2.4 percent of the population of Marin County is black. Hence, *Butera* cannot apply. Respondents urge that these black panel members have family incomes substantially in excess of that of the average black. No authority is cited for the view that this bespeaks racial discrimination, or suggests that selection of archetypes is required to avoid an inference of discrimination. A defendant is not entitled to a "jury tailored to the circumstances of the particular case," (Hoyt v. Florida, 368 U. S. 57, 59; People v. Newton, 8 Cal. App. 3d 359, 390-1).

As to the class of "Latin Americans" found by the trial court to be a cognizable group, the problem of representation is statistically more difficult. Census figures identify but two classes—"Spanish surname" (1.7% of the population) and "persons of Spanish language." (4.1%.) Respondents variously, and sometimes apparently interchangeably, refer to "Chicanos" (those of Mexican or Central American origin or descent), and "Latinos" (those whose origin or descent traces to countries of South America). Mexican-Americans and "Spanish heritage people", the group which respondents most emphasize, and which the court terms Latin Americans, are natives of Mexico and Central America and their children. Census figures do not cover such a group. One witness for respondents testified that 3000 of the "Span-

ish language persons" in Marin County are Mexican-American. It is apparent that it is but a small proportion of the whole. There is evidence that they have a feeling of ethnic identity, experience common economic and educational difficulties, and suffer some job discrimination. This evidence, as we have held, supports the finding that they constitute a cognizable group. But there is no evidence or suggestion of any discrimination by the selectors.

We recognize that where a substantial racial group, long-recognized and visible in the locality, is limited to mere token representation, the discrepancy cannot be excused upon the ground that the selectors knew no qualified persons of the misrepresented race (Cassell v. Texas, supra, 339 U. S. 282, 289). It is quite true that although the panel included three classified as "Spanish surname", none were Chicanos or Latin Americans. The selectors here testified that they knew of no organizations of Latin Americans, did not consider this racial group an identifiable group of the population, and for these reasons, did not specifically seek out representation of that group. But *Cassell* obviously is designed to root out disguised discrimination. Here, the record disclosed omission of a group which constituted at most a very small proportion of the population, was not readily visible, was geographically dispersed, possessed few or no organizations, and was partially assimilated in the general population. A principal complaint of those members of the group who testified was that the group is little known or recognized by the general community. These cir-

cumstances sharply differentiate their case from the facts of *Cassell.* There, blacks made up 15.5% of the population of Dallas County, Texas. Information as to the qualifications of members of this sizeable group, long existent and well known in the general community, was readily available. Thus "[t]he statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area were Negroes made up so large a proportion of the population, proved the intentional exclusion that is discrimination * * * " (339 U. S. at p. 290). There, the claimed blindness of the selectors obviously was self-induced—an intentional closing of the eyes to facts widely known. Here, on the contrary, the group involved is small and by its own members' testimony, not readily recognized by the community generally. In the vast range of racial strains to be found in the average American community, the oversight here bespeaks the opposite of intentional discrimination. There seems no basis for even an "inference of discrimination" under *Butera,* but even if that inference exists, it is fully dispelled by the evidence.

As to both the classes of youth and "blue collar workers" the selectors' testimony that they made particular efforts to secure their full representation is uncontradicted. There is no evidence of intentional or systematic exclusion. To suggest a rule in any way based upon some requirement of proportional representation of the many possible divisions of age and economic groups is to introduce an element of extreme and unwarranted difficulty into the jury

selection process. (See *Hamling v. United States*, ... U. S. ....., 94 S. Ct. 2887; *People v. Johnson*, 38 Cal.3d 228, 241, fn. 5.) Respondents focus upon the 21-30 age group. Of the total population of Marin County over the then age of majority, 22% were in the 21-30 age bracket, but only 6.6% of the panel were in this group. As to "blue collar workers" 25% to 29% of the population is in that class, and the panel contained 6.6%. (We note appellant's contention that 20% of the panel had incomes under $9,000, but feel it irrelevant in light of the trial court's use of "blue collar workers" as the relevant class.) But under even the broadest interpretation of *Butera*, "it is not the significant unexplained disparities themselves which are unconstitutional [citations]; they only raise the inference of discrimination. [Citations.] Once that inference has been raised, it is the government's failure or inability to demonstrate that the disparities are not the product of discrimination which confirms the inference and invalidates the jury pool." (420 F. 2d at p. 569.)

Here, the record contains uncontradicted evidence that the selectors made substantial efforts to secure larger numbers of both youth and labor groups. But educational, family and financial obligations rendered many of the younger people unable or unwilling to serve, and of the laboring group, financial consideration left them unable to afford the time necessary to grand jury service. As held in *Butera* itself (420 F. 2d at pp. 573-4), these are entirely proper grounds for deletions from the 105 who returned questionnaires to the selectors. And since there is no suggestion of

any discrimination in such omissions, any inference which even *Butera* would raise is thoroughly dispelled.

Respondents at most have shown a statistical imbalance in this one grand jury by which one small racial group, the Latin American, one age group, the young, and one earning group, the blue collar workers, each was represented on the grand jury panel of 30 by less than its proportion of the total population of the county. But the "mere fact of inequality in the number selected does not in itself show discrimination" (Akins v. Texas, supra, 325 U.S. at p. 403). There is neither evidence nor suggestion of purposeful discrimination by any of the five superior court judges who were the selectors of the panel. Nor, as we have demonstrated, is there any basis for an inference of discrimination. On the contrary, the record discloses a fair and honest effort to secure a panel representing a true cross section of the county population. The trial court did not find otherwise, but held the selectors to an excessively rigorous standard when it looked only to the result, rather than the manner, of the selection. Thus the constitutional standard has not been violated.

The order setting aside the indictment is reversed.

CERTIFIED FOR PUBLICATION.

Draper, P. J.

We concur:

Brown (H. C.), J.

Good, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of the Judicial Council.

Appendix B

In the Superior Court of the State of California
in and for the County of Marin

No. 4094

The People of the State of California
Plaintiff,
vs.
Stephen Mitchell Bingham, Hugo A. Pinell, John L. Spain, Louis N. Talamantez, Fleeta Drumgo, David Johnson and Willie Tate,
Defendants.

[Filed Jan. 17, 1974]

ORDER

The specific motion to be under consideration by the Court at this time is that one made by Defendant Spain, and joined in by all other Defendants herein, excepting Stephen Mitchell Bingham, whose present whereabouts the Court is advised, is unknown. He will be referred to herein only incidentally, leaving his claim to fame being the first named Defendant in these proceedings.

At first glance, the problem in this matter is to simply determine whether or not representation from an identifiable group of which a Defendant is a mem-

ber has been systematically excluded from the Grand Jury.

Defendants have urged that there are several "identifiable groups" in the County of Marin which the various Defendants fall:

1. The blacks.
2. The low wage blue collar class.
3. The Chicanos, or "Latinos".
4. The group of which the Defendants are without question members. Those residing in San Quentin, and those persons previously involved in criminal matters and described generally as ex-convicts.

As the Defendant Bingham did not join in this motion, and there is no evidence as to him belonging to any identifiable groups, his rights are not to be determined, and anything we say here will not be binding on him, and certain assumptions may be made concerning him. At the time this offense occurred, he was a member of the Bar, white, not of the blue collar working class, not a member of the convict or ex-convict class, and we will assume he is not a Latin American.

The Defendants Spain, Pinell, Drumgo, Johnson and Tate claimed that they were members of classes: 1. Black, 2. Low wage blue collar, 4. Convicts.

The Defendants Talamantez and Pinell claimed to be members of classes: 2. Low wage blue collar, 3. Chicano or Latino, 4. Convicts.

The California courts have held that to enable Defendants to object to the composition of a Grand Jury

on the grounds that members of an identifiable group have been systematically excluded from the Grand Jury, they must establish that they are members of tha group which has been excluded.

This apparently is the rule in California, though the Federal rule is otherwise. By the Federal rule, the manner of selection of a Grand Jury can be challenged on the basis that it was not chosen in a manner to represent a cross-section of the community by any Defendant.

A result of the California rule is that as to some Defendants an indictment may be quashed, and as to others may not be. The effect is that now you have a legally constituted Grand Jury, and now you don't. In the instant matter, the Grand Jury may have been legally constituted as to Defendant Bingham, but not as to the remaining Defendants.

The phrase "identifiable group" has been used throughout this hearing. In other proceedings the terms "significantly identifiable elements", "sociologically distinct groups", "cognizable groups", "legally cognizable groups" have been used. They all seem to mean the same thing.

The Court states in *Montez v. Superior Court,* 10 CA (3) 343 at 350 discussing "systematically deprived eligible members of their class from being considered for Grand Jury duty," quotes *Cassell v. Texas,* 339 U.S. 282, at 285 and 287 where "as a proportional matter 6.5% of Grand Jurors would be Negroes" and "actually over a five year period 6.7% had been Black." The Grand Jury was held to have been con-

stitutionally inadequate because "the testimony of the Jury Commissioner revealed that in selecting nominees they did not adequately acquaint themselves with the qualifications of eligible jurors of the Negro race in order that they might comply with the constitutional mandate that the jury be selected in such a way that "there has been neither *inclusion* nor *exclusion* because of race."

In *U.S. v. Butera,* 250 Fed. Reporter (2) 564, the Court recognizes as groups the following: Age groups, educational background, males and females.

The Court goes on to say: " 'Purposeful discrimination' is not limited to bad faith but exists where any significant *unexplained* disparities exist. The significant disparities are not unconstitutional. They raise an inference of discrimination."

Once the inference has been raised, it is the government's inability to demonstrate that the disparities are not the product of discrimination which can form the inference and invalidates the jury pool.

Selectors (commissioners) made an effort to retain persons whose groups might be otherwise depleted. Butera, siting in Note 23 page 574, cases in which "purposeful inclusion may sometimes be justified in order to correct an *existing inbalance.*"

But by whatever means may be used, the selection from these groups, out of which the Grand Jury is to be chosen, must represent a fair cross-section of the community.

The Court is of the opinion that the means used by the selectors did not assure a fair representation of the group to which the moving Defendants belong, to wit: The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the Grand Jury was selected. The pool was not shown to represent a cross-section of the community.

The Court is doubtful that it is a practical possibility to select a Grand Jury complying with the constitutional requirements through the means provided in Sections 895-900 of the Penal Code. It may be accomplished by following the procedures outlined in Section 903-903.3.

The motion of Defendants is granted, and the indictment is hereby ordered quashed.

Dated: January 17, 1974.

/s/ Vernon Stoll
Vernon Stoll
Judge of the Superior Court

Appendix C

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Jan. 29, 1975

I have this day filed Order
Hearing denied.

In re: 1. Crim. No. 12848

People vs. Pinell, et al.

Respectfully,
G. E. Bishel
Clerk

Appendix D

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

Crim. No. 12848

People of the State of California,
Plaintiff and Appellant,
vs.
Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Jan. 2, 1975]

BY THE COURT:

The petition for a rehearing filed in the above entitled cause is hereby denied.

Dated: Jan. 2, 1975.

/s/ H. C. Brown, Acting P.J.
H. C. Brown, Acting P.J.

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

Crim. No. 12848

People of the State of California,
Plaintiff and Appellant,

vs.

Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Jan. 2, 1975]

BY THE COURT:

The petition for rehearing filed on behalf of appellants' John L. Spain, Fleeta Drumgo, David Johnson and Willie Tate is denied.

Dated: Jan. 2, 1975.

/s/ H. C. Brown, Acting P.J.
H. C. Brown, Acting P.J.

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

Crim. No. 12848

People of the State of California,
Plaintiff and Appellant,
vs.
Hugo A. Pinell, et al.,
Defendant and Respondents.

[Filed Jan. 2, 1975]

BY THE COURT:

The petition for rehearing filed on behalf of appellant Luis N. Talamantez is denied.

Dated: Jan. 2, 1975.

/s/ H. C. Brown, Acting P.J.
H. C. Brown, Acting P.J.